Office - Supreme Court, U.S.
FILED
JUN 7 1958
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1957
No. 980

NATIONAL BISCUIT COMPANY,
Appellant

v.

COMMONWEALTH OF PENNSYLVANIA,
Appellee

MOTION TO DISMISS OR AFFIRM

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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1957

No. 990

NATIONAL BISCUIT COMPANY,

Appellant

v.

COMMONWEALTH OF PENNSYLVANIA,

Appellee

MOTION TO DISMISS OR AFFIRM

Appellee moves that the present appeal be dismissed or that the final judgment of the Supreme Court of Pennsylvania in the present case be affirmed on the grounds that (a) the judgment rests on adequate non-Federal bases, and (b) the Appeal does not present a substantial Federal question.

STATEMENT

In the present case, the courts below have sustained the imposition of the Pennsylvania Franchise Tax[1] upon the appellant for 1952, holding that it is an excise tax on the privilege of doing business in Pennsylvania.[2] The Pennsylvania courts had uniformly and unanimously construed the Franchise Tax as an *excise* tax in every case between the Commonwealth and its taxpayers.[3]

The appellant contended below that this unvarying line of cases had been overruled by a case between the City of Philadelphia and the appellant,[4] wherein the court had held that the city mercantile license tax imposed on appellant was not prohibited by the taxes which it paid to the Commonwealth and which were

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[1] Act of May 16, 1935, P.L. 184, as amended, 72 P.S. §§1871, 1901; Jur. St., Appendix A, pp. 21-29.

[2] 390 Pa. 642, 136 A. 2d 821; Jur. St. App. B, p. 30.

[3] *Commonwealth v. Columbia Gas & Electric Corp.*, 336 Pa. 209 215, 8 A. 2d 404 (1939); *Commonwealth v. Ford Motor Co.*, 350 Pa. 236, 240, 38 A. 239 (1944), App. Dis. 324 U.S. 827; *Commonwealth v. Quaker Oats Co.*, 350 Pa. 253, 260, 38 A. 2d 325 (1944), App. Dis. 324 U.S. 827; *Commonwealth v. Monessen Amusement Co., Inc.*, 352 Pa. 120, 122, 42 A. 2d 158 (1945); *Commonwealth v. American Gas Co.*, 352 Pa. 113, 117, 42 A. 2d 161 (1945); *Commonwealth v. Eaglis Corp.*, 352 Pa. 493, 47 A. 2d 661 (1946); all of these cases were cited with approval in the decision of the Supreme Court of Pennsylvania, Jur. St. App. B, pp. 31-36.

[4] *National Biscuit Company v. Philadelphia*, 374 Pa. 604, 98 A. 2d 182 (1953).

described as taxes on property. In the Philadelphia case, the court was construing a State statute [5] which permitted Philadelphia to impose taxes on subjects not taxed by the Commonwealth. In deciding that the city mercantile license tax applied to the appellant, the court there was construing only the limitation in the enabling statute of the city's power to levy conflicting taxation.

The majority opinion of the court below [6] logically distinguished and reconciled its decision in the Philadelphia case with the present case. Even if the two decisions had been irreconcilible, as the minority opinion of the court below suggested,[7] the error must have been in the Philadelphia case, because the minority opinion joined with the majority opinion in upholding the Franchise Tax as an excise tax.

The appellant here should not be permitted to relitigate its liability under the Philadelphia mercantile license tax in the present franchise tax litigation with the Commonwealth of Pennsylvania. There can be no substantial question of due process because of any alleged conflict between the decisions in the Philadelphia case and in the instant case.

If the Franchise Tax had been held to be a property tax, the ultimate question in the present appeal would have been whether the Constitution of the United States required the Commonwealth's taxing officers to exclude from the measure of the appellant's Fran-

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[5] Act of August 5, 1932, P.L. (Ex. Sess.) 45, 53 P.S. §4613, known as the Sterling Act, Jur. St. p. 75.

[6] Jur. St. pp. 36-42.

[7] Jur. St. p. 46.

chise Tax its United States securities and other intangibles located outside of Pennsylvania. Under the well-established decisions of this Court, the answer to this question is now clearly negative, since the State tax has been determined to be an excise tax for the privilege of doing business.

QUESTION PRESENTED

Is the due process clause of the Constitution of the United States violated when, after an unbroken line of cases like the present case between the Commonwealth of Pennsylvania and its corporation taxpayers had held that the State franchise tax is an *excise* tax, the court below refused to follow the dictum in a case between the appellant and the City of Philadelphia that the State taxes paid by appellant were taxes on "property", which did not preclude the City from imposing a mercantile license tax upon the appellant?

SUMMARY OF ARGUMENT

The only Federal constitutional question properly raised by the appellant [8] is that the decision of the courts below in the present case resulted in subjecting appellant to "simultaneous double taxation" which is "arbitrary and unreasonable" and a denial of a "fair trial in the courts, and a reasonable adjudication" of appellant's rights by reason of the "reversal of theory as to the nature" of the State tax involved.

This does not present a substantial Federal question.

The double taxation referred to is the Philadelphia mercantile license tax and the State Franchise Tax. The Philadelphia tax is imposed under a State statute [9] which authorizes the city to levy a tax on any privilege, transaction, subject, occupation or personal property which is not "subject to a State tax or license fee". In construing the enabling act, the court was determining the power of the municipality to tax. Such a construction of the local ordinance and the statute under which it is adopted did not affect the rights of the Commonwealth, which was not even a party to the proceedings. Unquestionably, Philadelphia could have imposed the mercantile license tax even though it was double taxation, if the enabling

[8] See Footnote 10, infra.

[9] Act of August 5, 1932, P.L. (Ex. Sess.) 45, 53 P.S. §4613, known as the Sterling Act. Jur. St. p. 75.

statute had been silent about possible conflicts with State taxes. In construing the express limitation on the city's power to tax, the court was not determining the relationship between State taxpayers and the Commonwealth.

It is difficult to imagine how the appellant was denied a fair trial or a reasonable adjudication of its right in the present case. The only basis pleaded for such a conclusion is the reversal of theory as to the nature of the Franchise Tax. However, there was no such reversal of theory. Even if there had been, the reaffirmance in the instant case of the well established rule that the Franchise Tax is an excise tax would not have been a denial of due process as to the appellant.

Thus, there can be no subsance to the Federal questions which the appellant seeks to raise in the present appeal.

ARGUMENT

1. The Only Federal Question Properly Raised by Appellant Is Based Upon an Alleged Reversal of the Theory as to the Nature of the Tax

The questions raised by the appellant in the present case are necessarily limited to those raised in the Specification of Objections set forth in the Appeal from the Board of Finance and Revenue to the Court of Common Pleas of Dauphin County.[10]

In paragraph 14 of the Specification of Objections,[11] the appellant first points out that the franchise tax settlement is contrary to the decision in the Philadelphia case. Sub-paragraph 2 assumes the tax to be a

[10] Section 1104 of The Fiscal Code, Act of April 9, 1929, P.L. 343, as amended, 72 P.S. §1104 (Jur. St. p. 2), authorizes appeals from the decision of the taxing officers of the Commonwealth to the Court of Common Pleas of Dauphin County. After providing that every appeal shall be accompanied by a "specification of objection" that section further provides: "• • • and no questions shall be raised which are not included in the specification of objections filed as hereinbefore provided". A corporation on appeal is not entitled to have a question determined which has not been included in the specification of objections: *Commonwealth v. Stephano Brothers*, 54 Dauph. 329, 49 D. & C. 617 (1944); *Commonwealth v. Butler County National Bank*, 65 Dauph. 33 (1954); *Commonwealth v. Koppers Co., Inc.*, 71 Dauph. 73 (1957).

[11] Record before Supreme Court of Pennsylvania, pp. 7a, 8a.

property tax, and alleges both State and Federal Constitutional grounds for the invalidity of the settlement. Since the Pennsylvania Courts have ruled in the present case that the Franchise Tax is an excise tax, sub-paragraph 2 is clearly inapplicable.

In sub-paragraph 3 [12] the appellant specifies the objections which apply if "the so-called 'Franchise Tax' settlement made against the apppellant for the year 1952 should be upheld by the Courts of the Commonwealth of Pennsylvania". Under this Specification of Objection, the appellant is again referring to the inconsistent decision in the Philadelphia case, and objects that the settlement "would subject appellant to simultaneous double taxation under two mutually exclusive taxing statutes, and would be arbitrary and unreasonable". Appellant then avers that if the decision in the Philadelphia case is not followed in this proceeding, "representing another reversal of theory as to the nature of the tax, appellant * * * will have been denied a fair trial in the courts, and a reasonable adjudication of its rights" in violation of the State and Federal Constitutions.

A fair reading of paragraph 14 (3) of the Specification of Objections indicates that the only Federal constitutional questions properly pleaded and presently pertinent are (a) simultaneous double taxation, and (b) denial of a fair trial because of a reversal of theory as to the nature of the tax. Neither of these grounds are substantial.

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[12] Record before Supreme Court of Pennsylvania, pp. 8a, 9a, 10a.

2. There Has Been No Reversal of Theory of the Nature of the Pennsylvania Franchise Tax

The majority opinion[13] of the Supreme Court of Pennsylvania in the present case, plainly and properly distinguished its prior decision in the Philadelphia case.[14] There the court was construing a State statute, known as the Sterling Act,[15] which authorized the city to levy taxes which did not conflict with or duplicate State taxes. The sole question in that case was whether the Philadelphia tax conflicted with the State taxes being paid by the same taxpayer. The court held that it did not so conflict.

In construing the Sterling Act, the Supreme Court of Pennsylvania had pointed out on several occasions that, in determining whether or not the local tax conflicted with a State tax, it was immaterial whether the tax be regarded as an excise or a property tax.[16]

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[13] Jur. St. pp. 36-42.

[14] *National Biscuit Co. v. Philadelphia*, 374 Pa. 604, 98 A. 2d 182 (1953).

[15] Act of August 5, 1932, P.L. (Ex. Sess.) 45, 53 P.S. §4613, known as the Sterling Act, Jur. St. p. 75.

[16] In *Murray v. Philadelphia*, 364 Pa. 157, 169, 71 A. 2d 280 (1950), which arose under the Sterling Act, the court said "* * * in construing the Act, it is immaterial that state taxes have been referred to as excise or franchise taxes or by any other adjective; the reality controls". To the same effect see *Rice Drug Co. v. City of Pittsburgh*, 360 Pa. 240, 242, 61 A. 2d 878 (1948), which upheld the validity of a mercantile license tax ordinance as to a dealer in cigarettes which had secured a state cigarette permit and paid the state cigarette tax. In *Federal Drug Co. v. Pittsburgh*, 358 Pa. 454, 457, 57 A. 2d 849 (1948), the court held that the city was not precluded from levying a mercantile license tax by the

This had been the law of Pennsylvania when the Philadelphia case arose. The dictum of the opinion writer in that case regarding the nature of the State taxes was entirely unnecessary to the result obtained, because, based on precedent there could have been no conflict between the Philadelphia mercantile license tax and the State Franchise Tax.

All of the cases arising between the Commonwealth of Pennsylvania and ifs taxpayers have consistently construed the Franchise Tax as an excise tax.[17] The Supreme Court of Pennsylvania in the instant case was merely following the well established law of Pennsylvania.

Since there is no irreconcilible conflict between the State Court decisions construing the Sterling Act and the Franchise Tax, there could have been no reversal in the theory of the nature of the Franchise Tax.

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existence of the state franchise tax, even though both taxes were privilege taxes; see quotation in opinion of the court below (Jur. St. App. B, pp. 38, 39), as follows: "The reasoning and principles established in upholding the Pittsburgh mercantile tax in the *Federal Drug Co.* case were equally applicable and decisive of the validity of the Philadelphia mercantile tax. It was therefore unnecessary in the *National Biscuit Co.* case to refer to the State franchise tax as a property tax or to treat it as such."

[17] See cases cited supra, Footnote 3.

3. Assuming That There Was a Conflict Between the State Court Decisions, the Instant Case Was Correctly Decided

The appellant here [18] complains that, because of two conflicting decisions of the Supreme Court of Pennsylvania, it is required to pay both the State Franchise Tax and the Philadelphia mercantile license tax. The alleged conflict between the two taxes constitutes the sole basis for the present appeal to this Court.

The majority opinion of the court below [19] reconciled the allegedly conflicting decisions in a logical and reasonable manner.

It is true that the minority opinion of the court below [20] recognized such a conflict. However, it should be quickly noted that even the minority opinion would have overruled its earlier decision in the Philadelphia case when it affirmed the franchise tax settlement.

Therefore, even under the construction of the minority opinion, there has been no mistake in the instant case; the only mistake was in failing to overrule the Philadelphia decision.

This does not give the appellant any basis for jurisdiction of this Court on appeal.

If appellant desires to persist in its contention that the Philadelphia decision was incorrect, it should di-

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[18] See Jur. St. p. 19.
[19] Jur. St. pp. 36-40.
[20] Jur. St. p. 46.

rect its litigation toward the city tax ordinance, and not attempt to have the question of its liability for the Philadelphia tax determined by this Court in the instant case.

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4. No Provision of the Federal Constitution Has Been Violated by the Supreme Court of Pennsylvania in Construing the Franchise Tax as an Excise Tax

As noted above,[21] the Supreme Court of Pennsylvania, in cases between the Commonwealth and its taxpayers, has never deviated from its position that the corporations which pay the Pennsylvania Franchise Tax are paying an excise tax for the privilege of doing business in Pennsylvania. This position has been held not only with respect to the appellant, but as to all other taxpayers since the enactment of the Franchise Tax in 1935.

Therefore, we do not have here a case where the State Court has changed a pre-existing interpretation of a tax statute as between the taxpayer and the taxing authority. Even in such cases, this Court has indicated that there would be no lack of due process, and therefore no basis for a Federal question.

A multitude of cases could be cited to show that the 14th Amendment to the Constitution of the United States does not impair the authority of the states to determine finally, according to their settled usage and established modes of procedure, issues which do not involve any right secured by the Constitution of the United States or an Act of Congress, or a treaty.

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[21] See cases cited supra, Footnote 3.

Although there appear to be no decisions exactly like the present case, the following excerpts from opinions of this Court should be sufficient to demonstrate the unavailability of the 14th Amendment for the purpose urged by the appellant in the present case:

> "* * * if the mistake is not so gross as to be impossible in a rational administration of justice, it is no more than the imperfection of man, not a denial of constitutional rights. * * *"[22]

> "* * * We cannot treat a mere error of state law, if one occurred, as a denial of due process; * * *"[23]

> "* * * There is no constitutional right to have all general propositions of law once adopted remain unchanged. * * * in general, the decision of a court upon a question of law, however wrong and however contrary to previous decisions, *is not an infraction of the 14th Amendment merely because it is wrong or because earlier decisions are reversed.*"[24]

> "* * * The new meaning, if there is any, is not ascribed to the Constitution because a later statute has said it must be done. The new meaning is the product of the independent judgment of a court. So the state court has told us, and the good faith of its declaration is not successfully impeached. * * * To changes thus wrought the

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[22] *Chicago Life Insurance Co. v. Cherry*, 244 U.S. 25, 30, 37 S. Ct. 492 (1917).

[23] *Gryger v. Burke*, 334 U.S 728, 731, 68 S. Ct. 1256 (1948).

[24] *Patterson v. Colorado ex rel. Attorney General*, 205 U.S. 454, 461, 27 S. Ct. 556 (1908).

Constitution of the United States does not offer an impediment." [25]

Even though it be assumed that the decision in the instant case were in conflict with the Philadelphia case, nevertheless, the decision in the present case would not be a denial of due process.

5. This Appeal Raises No Substantial Federal Question

It can no longer be questioned that a State excise tax levied upon a corporation for the privilege of doing business within the State may be measured by the apportioned value of its capital stock, including all of its securities, governmental or otherwise.[26]

Appellant relies [27] upon the decision of this Court in *New Jersey Realty Title Insurance Co. v. Division of Tax Appeals of New Jersey*,[28] wherein a local tax assessment in New Jersey was held to be invalid because it was a tax upon United States securities. However, appellant entirely overlooked the subsequent decision of this Court in *Werner Machine Co., Inc. v. Director of Division of Taxation*,[29] wherein the New Jersey corporate franchise tax was upheld despite the inclusion of Federal bonds in the determination of the net worth of the corporation.

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[25] *Peoples Banking Co. v. Sterling*, 300 U.S. 175, 182, 57 S. Ct. 386 (1937).

[26] See decisions of this Court cited by the Supreme Court of Pennsylvania, Jur. St. p. 43.

[27] Jur. St. pp. 3, 15.

[28] 338 U.S. 665, 70 S. Ct. 413 (1949).

[29] 350 U.S. 492, 79 S. Ct. 534 (1956), aff'g. 17 N.J. 121, 110 A. 2d 89.

Moreover, in contending that the State Franchise Tax and the Capital Stock Tax are equivalent, appellant is relying upon two decisions of the Pennsylvania Supreme Court[30] which apply to other unrelated taxes, and the effect of which as precedents has been completely nullified by later decisions of that court construing both the Franchise and the Capital Stock Tax Acts.[31]

It has been firmly established historically and by a uniform line of decisions that the Pennsylvania Franchise Tax is an excise tax on the privilege of doing business in Pennsylvania. Consequently, there is no basis for the appellant's contention that this is a property tax which infringes upon any of its constitutional rights.

Accordingly, the appeal in the present case should be dismissed, or the decision of the Supreme Court of Pennsylvania should be affirmed.

Respectfully submitted,

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[30] *Arrott's Estate*, 322 Pa. 367, 185 A. 697 (1936); *Commonwealth v. Union Trust Co. of Pittsburgh*, 345 Pa. 298, 27 A. 2d 151 (1942); Jur. St. pp. 8, 15, 17.

[31] *Commonwealth v. Monessen Amusement Co.*, 352 Pa. 120, 42 A. 2d 158 (1945); *Commonwealth v. Shenango Furnace Co.*, 362 Pa. 491, 67 A. 2d 113 (1949), discussed in detail by the court below, Jur. St. pp. 40, 41, 42.